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CERTIFICATE.

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~914~~ 131

G. E. HERRON

vs.

SOUTHERN PACIFIC COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 20, 1930

(35,045)

(35,045)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 914

G. E. HERRON

vs.

SOUTHERN PACIFIC COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 21, 1930

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5948

G. E. Herron, Appellant,

vs.

Southern Pacific Company, a Corporation, Appellee

Appeal from the United States District Court for the District of Arizona

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, under Sectio. 239 of the Judicial Code—Filed Mar. 3, 1930

Statement of Facts

This was an action to recover damages for personal injuries resulting from a collision between an automobile driven by the plaintiff and a freight train operated by the defendant. Seventh Avenue, in Phoenix, Arizona, where the accident occurred, runs north and south, and is intersected by two tracks used by the defendant, running east and west. At the time of receiving the injuries complained of, the plaintiff was driving north along Seventh Avenue, at about midnight, returning from a dance hall, accompanied by a companion. As they approached the railroad crossing, they were preceded by another automobile. At, or near, the intersection, the automobile ahead turned to the right and passed around the end of a freight train, which completely blocked the crossing. The plaintiff testified that he did not see the train until he had approached within about ten feet of it, and that he then applied his brakes, but without avail. He crashed into the train, wrecking his automobile and causing serious injury to himself. At the close [fol. 2] of the testimony on the part of the plaintiff, the court directed a verdict in favor of the defendant, and from the judgment on the verdict the plaintiff has appealed.

The verdict in favor of the defendant was directed in the court below because of the contributory negligence of the plaintiff. If the court below was at liberty to follow the settled rule in the courts of the United States, that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court (Barrett v. Virginian Ry. Co., 250 U. S. 473-6), the ruling of the court below in directing the verdict was justified and free from error. But section 5 of article 18 of the constitution of the state of Arizona provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." If the above constitutional provision was controlling upon the court below, sitting in that state, the direction of a verdict for the defendant because of the contributory negligence of the plaintiff was error.

QUESTIONS CERTIFIED

Therefore, for a proper decision of the above entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important and controlling question of law, concerning which we are in doubt, viz:

First. Is the above provision of the constitution of the state of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second. May a federal court sitting in the state of Arizona [fols. 3 & 4] direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?

Dated March 3, 1930.

Frank H. Rudkin, Frank S. Dietrich, Curtis D. Wilbur, U. S. Circuit Judges, Ninth Circuit.

[File endorsement omitted.]

A true copy. Attest March 3, 1930.
Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

Endorsed on cover: File No. 35,045. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 914. G. E. Herron, vs. Southern Pacific Company. (Certificate.) Filed May 20, 1930. File No. 35,045.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1929

G. E. HERRON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

No. [redacted]

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

October Term 1929

G. E. HERRON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

No. 914

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant, as plaintiff, filed his suit in the Superior Court of the State of Arizona in and for the County of Maricopa, on the 20th day of September, 1928, against the appellee, as defendant, alleging in his complaint in said action that he sustained personal injuries resulting in damages, and damages to his automobile, by reason of the negligence of the appellee, its servants and employees, in operating its cars and train, and in backing its freight cars without signal, lights or warning upon and over its track in an easterly direction over and across Seventh Avenue, an extensively traveled street in the city of Phoenix, Arizona, along which appellant was driving his automobile on the night of the occurence of

the accident and injury upon which appellant predicated his action.

The appellee duly filed a petition for the removal of the cause from the state court to the United States District Court in and for the District of Arizona and, pursuant to said petition, the cause was, by order of the Superior Court of Maricopa County, Arizona, made and entered on the 16th day of October, 1928, removed to the United States District Court for the District of Arizona.

A general demurrer interposed by the appellee to the complaint of appellant was overruled by the District Court after the removal of the cause thereto and, thereafter, the appellee filed its answer denying generally and specifically every allegation of appellant's complaint and alleging that the injury of appellant, if any, was caused or directly and proximately contributed to by the negligence of the appellant.

The case came on for trial on the 7th day of May, 1929, before the Honorable F. C. Jacobs, United States District Judge in and for the District of Arizona, and a jury, at Phoenix, Arizona. The appellant, in support of the allegations of his complaint, called and introduced eleven witnesses, including himself, all of whom testified in his behalf. No evidence was introduced by the appellee and, at the close of appellant's case, the appellee moved the court to instruct the jury to return a verdict in favor of the appellee upon the ground and for the reason, among others, that the evidence of appellant showed contributory

negligence on the part of appellant which precluded his recovery in said action.

Following the argument upon said motion the court granted the same upon the ground stated, and counsel for the appellant duly excepted to this ruling by the court for the reason that Section 5 of Article 18 of the Constitution of the State of Arizona required the court to submit to the jury the question of contributory negligence in the case. Section 5 of Article 18, of the Constitution of the State of Arizona, provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

Thereafter, appellant's motion for a new trial having been overruled by the district court, an appeal was perfected by appellant to the United States Circuit Court of Appeals for the Ninth Circuit, which said court, on the 3rd day of March, 1930, certified to this Court the following question:

First. Is the above provision of the constitution of the state of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second. May a federal court sitting in the state of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the

state constitutional provision to the contrary? (Certificate, page 2).

ARGUMENT

(Since there is but one question or proposition of law involved here, the appellant believes a summary of the argument would serve no purpose and the same is accordingly omitted.)

The effect of the Arizona constitutional provision here involved, as construed and announced by the Supreme Court of the State of Arizona, has been to take from the court, in all personal injury cases, the power or duty to determine the question of contributory negligence or assumption of risk and to vest that power or duty solely in the jury. The decisions of the Supreme Court of the state involving the provision establish beyond any question that, in any action for personal injury arising and tried within the State of Arizona, the jury, and the jury alone, has the right to determine whether or not the plaintiff was guilty of contributory negligence or had assumed the risk of the injury of which he complains.

In Inspiration Consolidated Copper Co. v. Conwell, 21 Ariz., 480, 486, 190 Pac. 88, the Court said:

> "Were it not for Article 18, Section 5 of the State Constitution * * * it would have been the duty of the trial court to have granted the defendants a new trial on the ground that the verdict was contrary to the evidence on the question of assumption of risk * * * The language of

> the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by the terms, transferred from the Court to the jury * * * We think that the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or non-existence of contributory negligence or assumption of risk in all actions for personal injuries."

This construction of the provision was reiterated and approved in the later case of Davis vs. Boggs, 22 Ariz. 497, 505; 199 Pac., 116, wherein it was also decided by the Court that, though the provision is found in the Article of the Constitution entitled "Labor," it applies to all personal injury actions; and the interpretation placed upon the provision in the Conwell case and the Davis case, supra, has been approved and followed by the Court in the following Arizona cases:

Varela vs. Reid, 23 Ariz., 414, 419; 204 Pac. 1017.

Wiser vs. Copeland, 23 Ariz. 325, 328; 203 Pac. 565.

Morenci Southern Ry. Co. vs. Monsour, 24 Ariz. 49, 51; 206 Pac. 489.

The question of the effect of the constitutional provision here under consideration in personal injury actions tried in the United States Courts was before

the Circuit Court below in the case of Southern Pacific Company vs. Martinz, (9th Cir.) 270 Fed. 770. In that case the plaintiff's intestate was killed while attempting to cross the railroad track at a crossing in an automobile in full view of an approaching train. In passing upon the contention made by the appellant in that case, that the trial judge should have instructed the jury to return a verdict for the defendant by reason of the negligence of plaintiff's intestate, the Court said:

> "The negligence of the driver and of the plaintiff's intestate in so attempting to cross the track might have been sufficient to justify the court below in directing a verdict for the defendant, but for the fact that the Constitution of Arizona provides: 'The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.'
>
> "A similar provision in the Constitution of Oklahoma was under consideration in Chicago, R. I. & Pac. Ry. Co. v. Cole, 251 U. S. 54, 64 L. Ed. 133, 40 Sup. Ct. Rep. 68, in which the constitutional provision was held to require the submission of the defense of contributory negligence to the jury in a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed."

The decision of the court in the Martinez case, supra, having been rendered as it was in a case which,

insofar as the application of the principle therein announced is concerned, is identical with the case at bar, would seem to finally and conclusively settle the question here involved and leave no room for the contention that Section 5, Article 18, Constitution of the State of Arizona, has no application to personal injury actions arising in Arizona and tried in the United States Courts in that state. Since, however, at the trial of this case, it was argued by the appellee that the holding of the Court in the Martinez case had been modified, if not overruled, by the later case of Atchison, T. and S. F. Ry. Co. vs. Spencer, (1927, 9th Circuit), 20 Fed. (2nd) 714, it is but proper that we should advert to the Spencer case, supra, and point out to the Court some of the facts and circumstances surrounding the decision rendered therein which, in our opinion, render the case valueless as an authority upon the proposition with which the Court is here concerned.

The decision in the Spencer case, supra, was clearly and expressly based by the court upon the ground that since the injury complained of by the plaintiff in that case was sustained by him while he was within the State of New Mexico, though the action was tried in Arizona, the law of New Mexico controlled the question as to whether or not the trial court could direct a verdict for the defendant upon the ground of the plaintiff's contributory negligence. The court there was in no manner concerned with deciding the effect of the constitutional provision here involved upon a personal injury action arising and tried within the State of Arizona; and while it is true that the court did discuss the question in its

opinion in the case, it expressly refused to render any final and authoritative decision thereon and any statements made by the court in its opinion with respect to the question are, therefore, but mere dicta and of no weight whatever in view of the previous holding of the court in the Martinez case. Further than this, while the authority upon which the dicta in the Spencer case is based is Barrett vs. Virginian Ry Co., 250 U. S. 473; 63 L. Ed. 1092, a case which announced no new principle of law but merely reiterated principles long established by previous decisions of this Court, it should be noticed that the Barrett case had been decided at the time the Martinez case arose and the decision in that case must be presumed to have been weighed and considered by the circuit court in reaching its decision in the Martinez case.

Another argument advanced by the appellee in the trial of this case was to the effect that the Martinez case did not decide that Section 5, Article 18, Constitution of the State of Arizona, was applicable to personal injury actions arising within the State of Arizona and tried in the United States Court of that District, but that the decision in that case was based upon the fact that the evidence in the case upon the question of the contributory negligence of the plaintiff's intestate was not clearly sufficient to have compelled a decision by the trial court that, if a verdict were rendered in favor of the plaintiff, the defendant would be entitled to a new trial. The mere statement of this argumnt, however, is sufficient to disclose its fallacy. If the evidence of contributory negligence in the Martinez case was in the condition

contended for by the appellee, that fact, and that fact alone, would have been sufficient to justify the trial court in refusing to direct a verdict for the defendant and no consideration whatever need have been given by the circuit court to Section 5, Article 18, Constitution of the State of Arizona.

Baltimore & Ohio Railroad Co. vs. Griffith, 159 U. S. 603, 611; 40 U. S. Law Ed., 274, 278.

Delk vs. St. Louis & San Francisco Railroad Co., 220 U. S.., 580, 587; 55 U. S. Law Ed., 590, 595.

Phoenix Mutual Life Ins. Co. vs. Doster, 106 U. S., 31, 32; 27 U. S. Law Ed., 65, 66.

Keyes vs. Grant, 118 U. S., 25, 37; 30 U. S. Law Ed., 54, 58.

The sum and substance of the appellee's contention is that though the defendant in the Martinez case was clearly and entirely precluded from obtaining a directed verdict in its favor on the ground of contributory negligence of the plaintiff's intestate, by reason of the state of the evidence upon that point, yet the court vainly and unnecessarily considered the effect upon such a case of the constitutional provision here involved. The sophistry of such an argument is self-evident, and we submit that the effect of Section 5, Article 18, Constitution of the State of Arizona, was considered by the circuit court in the Martinez case because such consideration was essential to a decision of the case; and we further submit that as a result of its consideration the court clearly and un-

equivocally held that the constitutional provision must be applied and given effect to by the United States Courts in all personal injury actions arising and tried within the State of Arizona.

An examination of those portions of the opinions in the Spencer case, supra, and in the Barrett case, supra, which touch upon the efficacy, in the Federal Courts, of a constitutional or statutory provision of a state which takes away or modifies the right of the court to direct a verdict for a party in cases which, but for the existence of such a constitutional provision, it would be the right and duty of the court to direct a verdict, discloses that the reason given by the Courts for holding such provisions inapplicable to cases tried in the federal courts lies in the fact that, in the opinion of the courts, the Act of June 1, 1872—the Conformity Act.—(U. S. C. Compact Ed., Title 28, Chapter 18, Sec. 724) does not require that the federal courts apply and give effect to such provisions. Such a view does not, however, in our opinion, dispose of the whole question.

Section 725, Chapter 18, Title 28, United States Code, provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In the view which we take of this provision, and we sincerely believe it to be sound, if Section 5, Ar-

ticle 18, Constitution of the State of Arizona, be held and construed to be a rule of substantive law rather than of procedure, if it vested in the defendant *a right* to have the question of his contributory negligence determined by a jury rather than by the Court, then the Arizona Constitutional provision is applicable to and must be given effect in trials in the United States Courts of personal injury actions arising and tried within the State of Arizona; for, as the principle has been well stated by this court in Re McNiel, 13 Wall., 236, 243; 30 L. Ed. 624, 626:

> "A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity or admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality.*" (Italics ours.)

With respect to the question of whether or not the Arizona Constitutional provision is substantive or merely procedural, the circuit court below said in the Spencer case, supra:

"It is our opinion that the constitutional provision in Arizona lays down a rule of substantive law rather than one pertaining to remedy or procedure * * * It cuts deep into the right, observed at common law, by which the defendant can obtain a decision by the court upon a proven state of facts * * * It seems clear that such a provision is essentially substantive and that the federal conformity statutes do not require its application."

Certainly, if the right of the defendant, at common law, to obtain a decision by the Court upon a given state of facts be considered a matter of substantive law, rather than of procedure, then the right of the plaintiff given by statute, to have the question of his contributory negligence, in all cases, decided by the jury is equally a matter of substantive law.

In Chicago, R. I. and P. Ry. Co. vs. Cole, 251 U. S. 54, 55; 64. L. Ed., 133. 134; 40 Sup. Ct. Rep., 68, this Court, in considering Article 23, Section 6, Constitution of the State of Oklahoma,—which is identical with Section 5, Article 18, Constitution of the State of Arizona,—undoubtedly viewed the constitutional provision as having the effect of diminishing the right of the defendant to the defense of contributory negligence in certain cases and as being, therefore, a mattr of substantive law rather than of procedure. The Court, speaking through Justice Holmes, there said:

"The state constitution was in force when the death occurred, and therefore the defendant had only such right to the defense of contributory

negligence as the Constitution allowed. The argument that the railroad company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether * * * In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished, when the ground might have been altogether removed."

In Byrne vs. Kansas City, F. S. and M. R. Co., 61 Fed. 605; 9 C. C. A., 666; 22 U. S. App., 220; 24 L. R. A., 693, the facts of the case, briefly stated, were these: Plaintiff filed an action for damages against the defendant railroad company in the Circuit Court of the United States for the Western District of Tennessee, alleging that his intestate had been negligently run over and killed by a train of the defendant company at a crossing within the city of Memphis. At the time of the accident the following statutory provisions were in force in the State of Tennessee, (Milliken and Vertrees Code Secs. 1298 et seq.):

"Section 1298: 3rd. On approaching a city or town, the bell or whistle shall be sounded when the train is at a distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts and at intervals till it has left the corporate limits."

"Section 1299: Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall

be responsible for all damages to persons or property, occasioned by or resulting from any accidents or collision that may occur."

Upon the trial of the case there was some evidence introduced by the plaintiff to the effect that the bell of the train was not rung as the crossing at which the accident occurred was approached, in violation of Section 1298, Paragraph 3, quoted above; but the trial court nevertheless instructed the jury to return a verdict in favor of the defendant by reason of the contributory negligence of the plaintiff's intestate. After reviewing the decisions of the Supreme Court of Tennessee which involved the construction of Section 1299, quoted above, and determining that the effect of that section, as construed and applied by the courts of Tennessee, was to render the proof of contributory negligence not a complete bar to an action for damages but only a circumstance to be considered by the jury in mitigation of damages, the Circuit Court of Appeals took up the question of whether or not the United States courts were bound to apply and give effect to Section 1299, and the construction placed upon that section by the state courts, in actions arising in Tennessee and tried in the United States Courts sitting in that state. The court, speaking through Justice Taft, said in its opinion in the case:

"If the decisions of the supreme court of Tennessee are controlling in this forum upon this point, then there can be no doubt that contributory negligence is not a bar to the action under section 1299 for failure to comply with any of

the subsections of section 1298, and that the court below erred in taking the case from the jury * * * "

"The question whether we are bound by the decision of the supreme court of Tennessee as to the effect of contributory negligence in statutory actions depends on the basis given by that court for its conclusion. If the statute is held to be merely declaratory of the common law both in its requirements and in the liability imposed for failure to observe it, and the plea of contributory negligence is allowed only in mitigation of damages, because, in the view of the supreme court of Tennessee, that is the only effect it could have in an action for common law negligence, we conceive that the effect of contributory negligence in such a case would be a question of general common law, with respect to which we might exercise an independent judgment. But if the rule of the state supreme court grows out of the peculiar liability imposed by the statute as distinguished from that imposed for negligence at common law, then it is the legitimate effect of a construction of a state statute by the highest tribunal of the state, and we are, of course, bound by it * * * We are thus brought back to the proposition that the rule of law in Tennessee which prevents the defense of contributory negligence from being a complete bar to the action under the statute grows out of the language of the statute itself and the construction of that language by the supreme court of Tennessee. Therefore it follows that the duty of the trial

judge in the court below was to follow the decisions of the state court with reference to the defenses under this statute, and that the gross negligence of Mason was not a complete bar to the action, but should have been considered by the jury in mitigation of damages."

There is this analogy between the Byrne case, supra, and the case at bar: the statutory provision of Tennessee involved in the Byrne case and the constitutional provision of Arizona here involved both have the same effect, namely, to diminish the efficacy of the plaintiff's contributory negligence as a defense which would bar the plaintiff's right to a recovery. Both provisions are matters of substantive law rather than procedure. And we earnestly submit that if, as it was decided by the court in the Byrne case, the Federal Courts are bound to apply and give effect to the statutory provision of Tennessee in cases arising within that state, then, for the same reasons, the trial court below was bound to apply and give effect to the constitutional provision of Arizona in the case now before the Court, and its failure to do so constituted manifest and reversible error.

CONCLUSION

We submit, in conclusion, that the question with which the Court is here concerned has been heretofore fully considered by the circuit court below and that, upon such consideration, the court decided that the Arizona constitutional provision was binding and controlling upon a federal court sitting in that state.

We submit further that, for all of the reasons stated herein, the decision of the circuit court is correct and the questions certified to this Court should be answered accordingly.

Respectfully submitted,

P. H. HAYES,

Counsel for Appellant.

M. J. DOUGHERTY,

J. A. WALSH,

Of Counsel for Appellant.

FILE COPY

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FEB 18 1931
CHARLES ELMORE CROPLEY

In the

Supreme Court of the United States

OCTOBER TERM, 1930

G. E. HERRON,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation;
Appellee.

No. 131
(October Term, 1929—No. 914)

BRIEF FOR APPELLEE

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In the

Supreme Court of the United States

OCTOBER TERM, 1930

G. E. HERRON, *Appellant,* vs. SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee.*	No. 131 (October Term, 1929—No. 914)

BRIEF FOR APPELLEE

FOREWORD:

This cause was tried in the United States District Court for the District of Arizona and resulted in a directed verdict in favor of the defendant, because of the contributory negligence of the plaintiff. From the judgment on the verdict in favor of the defendant the plaintiff appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The latter Court, on March 3, 1930, as shown by the printed certificate on file herein, held the plaintiff to be guilty of contributory negligence as a matter of law, and stated:

> "If the court below was at liberty to follow the settled rule in the courts of the United States, that

whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court (Barrett v. Virginian Ry. Co., 250 U. S. 473-6), the ruling of the court below in directing the verdict was justified and free from error. But Section 5 of Article 18 of the Constitution of the State of Arizona provides: 'The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury'."

The Circuit Court of Appeals certifies to the Supreme Court only one question and that is:

"Therefore, for a proper decision of the above entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important and controlling question of law, concerning which we are in doubt, viz:

First: Is the above provision of the Constitution of the State of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second: May a federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?"

ARGUMENT

Appellant G. E. Herron, through his counsel, has filed a brief herein, contending that the certified question should be answered to the effect that the above quoted provision of the Arizona Constitution is binding and controlling upon a federal court and that the district court is prohibited from directing a verdict on the grounds of contributory negligence. In support of his argument appellant cites Inspiration Consolidated Copper Company vs. Conwell, 21 Ariz. 480, 190 Pac. 88, and other Arizona cases construing the section of the constitution in question. In the Inspiration case the court stated that were it not for the State Constitution it would have been the duty of the trial court to set aside the verdict on the ground of assumption of risk, but that the constitutional provision is plain and that its evident purpose is to make the jury the sole arbiter of the existence of contributory negligence or assumption of risk, no matter what the state of the evidence may be. At first the Supreme Court of Arizona liberally applied the constitutional provision in question and made same applicable to any state of the evidence. As we read later decisions of the Arizona Court it is evident that the unjust encroachment upon the province of the court and judge, effected by this provision, has been felt, and its rigors have been lessened. The very late case of Franco vs. Vakares, (Ariz. 1929) 277 Pac. 812, clearly indicates the trend of opinion in the Arizona Courts. That was a suit by the administrator of a guest riding in an automobile against the owner and driver of the car for the death of the guest, resulting from a collision of the automobile and a street car. There was no question of the negligence of the driver—he was drunk and recklessly drove into the street car. However, the proof further

showed that the deceased knew that the driver was drunk, and had furnished some whiskey to aid in the intoxication. The Supreme Court stated:

> "On the issue of contributory negligence, the court under section 5, art. 18, of the Constitution, would have properly submitted the case to the jury if that had been the only issue. That section provides that the defense of contributory negligence is one of fact and to be left to the jury at all times. Whatever the state of the testimony, contributory negligence must always go to the jury when made an issue. *It would seem, however, that, where the facts uncontrovertedly convict the plaintiff's intestate of contributing to his own injury and death, as they do in this instance, the court should have exercised its discretion upon a motion for a new trial to vacate and set aside the verdict for that ground.* * * *
>
> "We think the court should have granted defendant's motion for a directed verdict at the close of the case on the ground that the evidence conclusively and without conflict showed that the plaintiff's intestate was guilty of independent negligence." (Italics ours.)

Such decision can only be interpreted one way—the Supreme Court of Arizona has held that the constitutional provision does not apply where the facts uncontrovertedly disclose contributory negligence on the part of the plaintiff and that when the facts are uncontroverted, then the question is one of law for the court. That is not so materially different from the rule applied in the federal court—when reasonable men can come to only one conclusion then negligence is a question of law. Under the reasoning of Franco vs. Vakares, we have no doubt the

Arizona court would have ordered a directed verdict in this Herron case.

The above comment on the decisions of the Arizona court is only for the purpose of showing the modern trend of the Court to consider itself not strictly bound by the constitutional provision. It is our contention that a federal court is not bound or controlled by such provision of the Arizona Constitution, regardless of any construction placed upon same by the Arizona court. The provision lays down a rule of substantive law, rather than one pertaining to procedure, and is not required to be observed by a federal court under the Conformity Act. (28 U. S. C. A. 724).

Appellant, in the court below, and in this court, in his brief cites the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in Southern Pacific Company vs. Martinez, 270 Fed. 770, as being an authority holding that the constitutional provision in question is binding and controlling on a federal court. However, the same Circuit Court of Appeals, in a later case, A., T. & S. F. Ry. Co. vs. Spencer (9th Cir. 1927) 20 Fed. (2nd) 714, decisively held that in the Martinez case the question now involved was not passed upon and the only point decided was that the evidence was not clearly sufficient to compel an instructed verdict under the rule of courts of the United States. And in such Spencer case, the Circuit Court of Appeals further stated:

> "It is our opinion that the constitutional provision in Arizona lays down a rule of substantive law, rather than one pertaining to remedy or of procedure. Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104. It cuts deep into the right, observed at common law, by which a defendant can

obtain a decision by the court upon a proven state of facts. What is, at common law, within the power of the judge of the court to decide, is in all cases left to the jury, and their finding is conclusive on the court. Thus, although by the law of the place where an injury has been inflicted the power and duty of the judge are to pass upon a clearly established state of facts, a litigant may avoid the consequences of the exercise of those functions by going into a jurisdiction where the fundamental local law strips the court of that power by making the jury the sole arbiter of a question with conclusive force upon the court.

"It seems clear that such provision is essentially substantive, and the federal conformity statutes do not require its application."

We call attention to the fact that the Spencer case, above mentioned, has been cited by annotators as an authority for the text that the Arizona constitutional provision is substantive and need not be applied under the Conformity Act.

2 Cyc. Fed. Procedure, Sec. 459, p. 608;
28 U. S. C. A. 724, p. 68.

And, of course, it is apparent the Circuit Court of Appeals did not pass upon the matter in the Martinez case, because such court has certified the question to this Supreme Court.

Appellant also cites the case of Chicago, Rock Island & Pacific Ry. Company vs. Cole, 251 U. S. 54; 40 S. Ct. 68; 64 L. Ed. 133. The Oklahoma Constitution contains a provision similar to that of Arizona now in question, but the Cole case did not undertake to decide whether

the same was binding on a federal court. It went no further than to hold the provision of the Oklahoma Constitution to be not violative of the Federal Constitution. The Cole case went to the Supreme Court of the United States on writ of error to the Supreme Court of the State of Oklahoma. The constitutional provision was attacked on the ground that it violated the due process clause of the Federal Constitution. And the Supreme Court of the United States held the same constitutional insofar as it *governs the state courts* but its effect upon a federal court was not in question. The Supreme Court said:

> "There is nothing, however, in the Constitution of the United States or its Amendments, that requires *a state to maintain the line with which we are familiar between the functions of the jury and those of the court.*" (Italics ours.)

This decision indicates that a state may, insofar as its own courts are concerned, destroy the line between functions of the court and jury, but does not hold that a state can enforce such destruction upon the federal court. On the contrary, it strongly implies that such a rule will not be followed by a federal court, although a state may enforce it upon its own courts.

Appellant contends that if the federal court is not bound to enforce the Arizona provision under the Conformity Act, then it must apply the same by virtue of section 721, Revised Statutes of the United States, 28 U. S. C. A. 725, reading:

> "725. **Laws of State as rules of decision.** The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of

decision in trials at common law, in the courts of the United States, in cases where they apply."

The constitutional provision is not a rule of decision to be followed by a federal court under section 725. Such section requires a federal court to follow state laws as rules of decision only in cases when the matter is peculiarly subject to local law, such as construction of state statutes, property rights, titles, validity of contracts and wills, and the like.

2 Cyc. Fed. Pro. Sec. 405, p. 466;
28 U. S. C. A. 725 and annotation.

The meaning of this section relative to rules of decision is well illustrated in Edward Hines, Trustee vs. Martin, (1925) 268 U. S. 459; 69 L. Ed. 1050:

"Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the State are peculiarly questions of local law, to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts."

and in Tweeten vs. Tacoma Railway & Power Co., (1914) 210 Fed. 828:

"Here is a situation which seems to demand remedial legislation; for, while the courts of the United States will follow the decisions of the courts of the state in which they are held when, in construing the common law, those decisions establish a rule of property, *they must ignore them when they establish no more than a rule of liability for personal injuries.*" (Italics ours.)

The constitutional provision relative to contributory negligence does not establish any rule of property, right or title, constituting a rule of decision to be followed by a federal court. It is a provision designed to destroy the line of demarcation between functions of court and jury. It undertakes to dictate what functions the court shall exercise and what functions the jury shall exercise. In practice it effects and enforces a rule of presumption in that it states that the testimony shall at all times and under all conditions be sufficient to raise an issue of fact. It establishes a rule that is unquestionably a matter of substantive law and not procedure—but is not a *rule of decision* affecting property, contracts or fundamental liability. It is an effort to dictate to a federal court the terms and manner under which it will direct a verdict, instruct a jury or grant a new trial. It has been definitely settled that the federal courts will not follow such a rule.

Appellant cites Byrne vs. Kansas City F. S. & M. R. Co., 61 Fed. 605, giving effect to a statute of the State of Tennessee, which had been construed by the state courts as rendering proof of contributory negligence not a complete bar to an action but only a circumstance to be considered in mitigation of damage. The state of Tennessee did not undertake to define what constituted contributory negligence nor to prohibit the court from deciding as a matter of law what is contributory negligence—but on the contrary it entirely abolished the defense except as a mitigating circumstance as to the amount of damage. That is an entirely different matter than before us. If the state of Arizona enacted a statute entirely abolishing the defense of contributory negligence in a personal injury action, such a statute, unless the same was unconstitutional, would be a rule of decision to be followed by

the federal court. It would provide a new right or abolish a previous liability, as you may view it, and would constitute a fundamental right to be recognized by a federal court. For instance, the Arizona Employers' Liability Act, a special statute applying to employer and employee in certain specified hazardous occupations, entirely abolishes the defense of assumption of risk and of ordinary contributory negligence. Such Employers' Liability Act has been followed by the federal court as a rule of decision under section 725 above referred to, and properly so, as a fundamental right had been established by statute. But the State of Arizona has never abolished contributory negligence as a defense in ordinary negligence actions, such as crossing accidents (as the present case), but on the contrary the state courts have not only recognized contributory negligence as a defense but have held the same to be an effective and complete bar to recovery.

Franco vs. Vakares, (Ariz. 1929) 277 Pac. 812;

So. Pac. Co. vs. Fisher, (Ariz. 1929) 274 Pac. 779;

Morenci So. Ry. Co. vs. Monsour (1919) 21 Ariz. 148; 185 Pac. 938;

White vs. Ariz. Eastern R. R. Co. (1926) 30 Ariz. 151; 245 Pac. 270.

The provision of the Arizona Constitution in question does not abolish a defense but undertakes to dictate who shall be the arbiter of the sufficiency of the evidence to establish the same.

The United States Supreme Court has declared on numerous occasions that it will not accept such dictation. A case closely analogous is that of states attempting to govern the terms and conditions under which verdicts shall be instructed. The generally accepted rule of

federal courts as to instructed verdicts is, where the evidence is undisputed or clearly preponderant upon a question of negligence or contributory negligence, and the court, in the exercise of its sound discretion, would be compelled to set aside a verdict returned in opposition, then it is the duty of the court to instruct a verdict.

Delaware, Lackawanna & Western R. R. Co. vs. Converse, 139 U. S. 469;

So. Pac. Co. vs. Pool, 160 U. S. 438.

In Barrett vs. Virginian Ry. Co., 250 U. S. 473; 63 L. Ed. 1092, the Supreme Court of the United States, after reciting the above rule of courts of the United States relative to instructed verdicts, states:

> *"And this rule is not subject to modification by state statutes or constitutions."* (Italics ours.)

We believe that the Barrett case is conclusive on the question before us. In positive language the Supreme Court held that the federal rule was to instruct a verdict when the evidence was undisputed or clearly preponderant and that such rule was not subject to modification by state law. The Arizona provision is nothing more than a command to the court that in the particular matter of contributory negligence you shall not instruct a verdict, even if the evidence is undisputed and clearly preponderant and even if the court would be compelled to grant a new trial.

New Amsterdam Casualty Co. vs. Farmers Co-op. Union, 2 Fed. (2d) 214.

Another very strong point in support of our contention is the fact that the laws of the United States expressly provide that all United States courts shall have

the power to grant new trials for reasons for which new trials have usually been granted in courts of law. 28 U. S. C. A. 391. Congress by enactment, having provided for granting of new trials, federal courts in such regard, could not under any condition be affected by state statutes, laws or practices governing the same matter.

McDonald vs. Pless, 238 U. S. 264;
Latchtimacker vs. Jacksonville (1910) 181 Fed. 276;
City of Detroit vs. Grummond (1914) 216 Fed. 273.

If this case had gone to the jury and a verdict had been returned for the plaintiff the district court would have granted a new trial for reasons for which new trials have usually been granted in courts of law, i. e., uncontroverted evidence of contributory negligence—and in the granting of such new trial it would be governed by the federal statute permitting the same and not affected by the Arizona provision prohibiting the same. If appellant's contention is true, then a course of trials, verdicts and the granting of new trials would continue on indefinitely. Of course, such a proceeding is unreasonable and a district court should instruct a verdict in the first instance and the Arizona constitutional provision is not controlling.

The constitution of the state of Colorado provides that in libel cases the jury are the sole judges of both law and fact. In Seested vs. Post Printing & Publishing Company (1926) 15 Fed. (2d) 595, the United States District Court for the District of Colorado held that it was not required to follow such rule as a matter of procedure under the conformity act nor as being a rule of decision under Section 725; saying:

"Every litigant in the federal court has an inherent right to have the law of the case determined

by the judge. It is not hard to imagine why this right is most valuable and necessary for the protection of his property, as well as his liberty. If the jury were to declare the law, who could say in advance what the law on any given question is? The judge would, or should, at least, abstain from the responsibility of stating the law to them, and would not be justified in directing a verdict, irrespective of the weakness of the prosecution, or of the plaintiff's testimony, as the case might be. The inevitable result would be that the rights and liberties of our citizens would be determined by an irresponsible tribunal, ignorant of the law, instead of one trained in jurisprudence and disciplined by study and experience, or, to put it another way, by a tribunal that makes its own law, as distinguished from one that would follow the law impartially as laid down by statute, eminent jurists, or decided cases, irrespective of persons, times, or popular agitation."

A federal court will not take dictation from a state as to how it shall instruct a jury nor the manner of instruction; nor will it observe any state law relating to the administration of the judge in the discharge of his separate functions. The practice act of Illinois provides that a court in charging a jury shall instruct only as to the law of the case and shall not comment upon facts and makes further provision relative to the manner of instructing the jury and requiring that the instructions shall be taken by the jury in their retirement. Holding that such a law is not binding upon a federal court, the Supreme Court of the United States in Nudd vs. Burrows (1875) 91 U. S. 426 said:

"The personal conduct and administration of the judge in the discharge of his separate functions

is, in our judgment, neither *practice, pleading*, nor *a form* nor *mode of proceeding* within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

"There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them."

The Supreme Court has affirmed the rule laid down in the Nudd case in the following:

Indianapolis & St. Louis R. R. Co. vs. Horst, (1876) 93 U. S. 291;

Vicksburg & Meridian R. R. Co. vs. Putnam, (1886) 118 U. S. 545;

St. Louis, Iron Mtn. & So. Ry. vs. Vickers, (1887) 122 U. S. 360;

Lincoln vs. Powell, (1894) 151 U. S. 436.

Other instances in which the courts of the United States have refused to follow state rules or decisions are:

In determining the sufficiency of facts to constitute negligence or contributory negligence they will not follow the state law but will be governed by federal rules.

So. Ry. Co. vs. Smith, (1914) 214 Fed. 942;

Conrad vs. Wheelock, (1928) 24 Fed. (2d) 996.

They will follow their own rules with respect to presumption and burden of proof without regard to state law.

Harmon vs. Barber, (1918) 247 Fed. 1.

They will set aside, vacate or modify their judgments at any time during the term although there is a state law to the contrary.

So. Pac. Co. vs. Kelley, (1911) 187 Fed. 937.

And they will not follow state statutes or decisions on questions of general or commercial law.

R. R. Co. vs. National Bank, 102 U. S. 14;
Bryant vs. Williams, (1926) 16 Fed. (2d) 159.

To enforce the provision of the Arizona Constitution in question a federal court would be allowing the state to dictate to a judge of a court of the United States the administration of his duties, which will not be tolerated.

CONCLUSION

The Circuit Court of Appeals for the Ninth Circuit has held that it appears from the evidence in this cause that the plaintiff, as a matter of law, was guilty of contributory negligence and that under the settled rule in the courts of the United States the defendant was entitled to an instructed verdict—it necessarily follows that if the case had been submitted to the jury and there had been a verdict for the plaintiff, under the provisions of 28 U. S. C. A. 391, the court would have been required to have granted defendant a new trial.

The question certified to this court, paraphrased is: Under these circumstances is a district court of the United States bound and controlled by section 5 of article 18 of the Constitution of the State of Arizona and thereby prohibited from instructing a verdict on the grounds of contributory negligence, although the evidence

establishing such negligence is uncontroverted and conclusive?

We submit that such question should be answered in the negative. It is not a *rule of procedure* required to be followed under the Conformity Act, but on the contrary is a matter of substantive law; nor is it a *rule of decision* under the provisions of section 721 Revised Statutes of the United States. On the contrary, it is nothing more than an attempt to dictate to courts of the United States what function shall be exercised by the judge and what function by the jury—it is an attempt to dictate to a federal judge the administration of his functions, and an endeavor to limit and restrict the granting of new trials in a court of the United States. This should not be tolerated.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 131.—October Term, 1930.

G. E. Herron, vs. Southern Pacific Company. } On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[April 13, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This action was brought in the District Court of the United States for the District of Arizona to recover damages for personal injuries resulting from a collision between the plaintiff's automobile and the defendant's train. The accident occurred in Phoenix, Arizona. At the close of the testimony on the part of the plaintiff, the court directed a verdict for the defendant, upon the ground that the plaintiff was guilty of contributory negligence. The plaintiff appealed to the Circuit Court of Appeals. That court states that, if the court below was at liberty to follow the settled rule in the courts of the United States that "whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered, the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court" (*Barrett* v. *Virginian Railway Company*, 250 U. S. 473, 476), the action of the trial court was justified. But section 5, article 18, of the constitution of Arizona provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

In view of this requirement, the Circuit Court of Appeals has certified the following questions of law for the decision of this Court:

"First. Is the above provision of the constitution of the State of Arizona binding and controlling upon a Federal court sitting in that State? Or, putting the question in another form:

"Second. May a Federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?"

Construing the constitutional provision, the Supreme Court of Arizona in *Inspiration Consolidated Copper Company* v. *Conwell*, 21 Ariz. 480, 486, 487, 190 Pac. 88, 90, 91, said: "The language of the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by its terms, transferred from the court to the jury. . . . We think that the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or non-existence of contributory negligence or assumption of risk in all actions for personal injuries."[1]

It does not appear to be insisted by the appellant, and it could not be maintained, that this constitutional provision must be followed by the Federal courts by virtue of the Conformity Act. U. S. C., Tit. 28, sec. 724. The State, without violating the requirements of due process, may provide such a rule for its own courts, as it may do away with the jury altogether (*Chicago, Rock Island & Pacific Railway Company* v. *Cole*, 251 U. S. 54, 56), but in view of its nature and effect, the rule cannot be regarded as one that relates merely to practice or to a "form" or "mode of proceeding". The provision "cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts." *Atchison, Topeka & Santa Fé Railway Company* v. *Spencer*, 20 F. (2d) 714, 716. Even with respect to the burden of proof as to contributory negligence, this Court has said: "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. . . . But the United States

[1]See, also, Davis *v.* Boggs, 22 Ariz. 497, 199 Pac. 116; Wiser *v.* Copeland, 23 Ariz. 325, 203 Pac. 565; Varela *v.* Reid, 23 Ariz. 414, 204 Pac. 1017; Morenci Southern Railway Co. *v.* Monsour, 24 Ariz. 49, 206 Pac. 589; Cf. Southern Pacific Co. *v.* Fisher, 35 Ariz. 87, 274 Pac. 779.

courts have uniformly held that as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle, even in trials in States which hold that the burden is on the plaintiff." *Central Vermont Railway Company* v. *White*, 238 U. S. 507, 512. See, also, *Beutler* v. *Grand Trunk Junction Railway Company*, 224 U. S. 85, 88.

Nor is the provision applicable, which the appellant invokes, that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." U. S. C. Tit. 28, sec. 725. The controlling principle governing the decision of the present question is that state laws cannot alter the essential character or function of a Federal court. The function of the trial judge in a Federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the Federal court under either the Conformity Act or the "rules of decision" Act. Thus, a Federal court is not subject to state regulations, whether found in constitutional provisions or in statutes, providing that the court shall not give an instruction to the jury unless reduced to writing, or that written instructions shall be taken by the jury in their retirement (*Nudd* v. *Burrows*, 91 U. S. 426, 441, 442; *Lincoln* v. *Power*, 151 U. S. 436, 442); or that the court shall require the jury to answer special interrogatories in addition to their general verdict (*Indianapolis & St. Louis Railroad Company* v. *Horst*, 93 U. S. 291, 300); or that the court shall not express any opinion upon the facts (*Vicksburg & Meridian Railroad Company* v. *Putnam*, 118 U. S. 545, 553); or charge the jury with regard to matters of fact (*St. Louis, Iron Mountain & Southern Railway Company* v. *Vickers*, 122 U. S. 360, 363); or shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside (*Barrett* v. *Virginian Railway Company, supra*).

In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides.

As was said by Mr. Justice Story, in *United States* v. *Battiste*, 2 Sumner, 240, 243: "It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court."

"Trial by jury," said the court in *Capital Traction Company* v. *Hof*, 174 U. S. 1, 13, 14, "in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." See, also, *United States* v. *Philadelphia & Reading Railroad Company*, 123 U. S. 113, 114; *Patton* v. *United States*, 281 U. S. 276, 288, 289.

Where, in an action in a Federal court to recover damages for personal injuries, contributory negligence or assumption of risk constitutes a defense,[2] and, by reason of the facts being undisputed and of the absence of conflicting inferences, the evidence of contributory negligence or assumption of risk is conclusive and the question is one of law, the judge has the right and duty to direct a verdict for the defendant. *Railroad Company* v. *Houston*, 95 U. S. 697, 702; *Northern Pacific Railroad Company* v. *Freeman*, 174 U. S. 379, 384; *Southern Pacific Company* v. *Berkshire*, 254 U. S. 415, 418, 419; *Baltimore & Ohio Railroad Company* v. *Goodman*, 275 U. S. 66, 69, 70.

The first question is answered, "No"; the second, "Yes."

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[2]Under the Federal Employers Liability Act (U. S. C., Tit. 45, sec. 53) contributory negligence is not a defense but only goes in mitigation of damages. Chicago, Rock Island & Pacific Railway Co. *v.* Ward, 252 U. S. 18, 21, 23; Grand Trunk Western Railway Co. *v.* Lindsay, 233 U. S. 42, 49. As to the defense of assumption of risk under that Act, see Seaboard Air Line Railway *v.* Horton, 233 U. S. 492; Jacobs *v.* Southern Railway, 241 U. S. 229, 235; Chicago, Rock Island & Pacific Railway Co. *v.* Ward, *supra*. See, also, Longshoremen's & Harbor Workers' Compensation Act (U. S. C., Tit. 33, sec. 905); Nogueira *v.* New York, New Haven & Hartford Railroad Co., 281 U. S. 128, 131, 137.